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In the

Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. [redacted] 58

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,
Petitioner,

vs.

ELGIN, JOLIET & EASTERN RAILWAY COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968.

No. 1101

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,

Petitioner,

vs.

ELGIN, JOLIET & EASTERN RAILWAY COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF IN OPPOSITION

QUESTION PRESENTED

Is a dispute between a railroad and a labor organization as to the meaning and application of collective bargaining agreements in force and effect under the Railway Labor Act properly referrable to an administrative agency under that Act?

STATEMENT OF THE CASE

This action was commenced in October, 1967, by the Brotherhood of Locomotive Firemen and Enginemen (BLF&E) for the purpose of securing an injunction which would require the Elgin, Joliet and Eastern Railway Company (EJ&E) to employ and assign firemen to a plant switching locomotive which the EJ&E was operating within the confines of a United States Steel Corporation plant at Gary, Indiana. As grounds for the requested injunction, the BLF&E's complaint asserted that its collective bargaining agreements with EJ&E required the use of firemen on all locomotives operated by EJ&E and that EJ&E had violated the Railway Labor Act in that EJ&E was operating the plant switching locomotive without negotiating a change in the collective bargaining agreements.

In response to the complaint, EJ&E contemporaneously filed both an answer and a motion. The motion, in the alternative, sought to have the District Court (1) dismiss the action on the ground that the final judgment of the United States District Court for the District of Columbia in *Bangor and Aroostook R. Co.* v. *Brotherhood of Locomotive Firemen and Enginemen,* 253 F.Supp. 682 was technically *res judicata* between the parties; (2) transfer the cause to the United States District Court for the District of Columbia; or (3) stay the proceedings pending disposition of the appeal then pending from the final judgment of the District Court in *Bangor and Aroostook.* EJ&E's answer admitted that it was operating the locomotive in question as well as other plant switching locomotives without firemen and asserted that its practice was in full compliance with the collective bargaining agreements in force and effect between the parties as those agreements had been modified by the Award of Arbitra-

tion Board 282, the Arbitration Board which had been created by Public Law 88-108. The answer also alleged that the dispute between the parties was properly referable to, and within the exclusive jurisdiction of, an administrative body under the provisions of either the Railway Labor Act or Public Law 88-108.

The District Court, after denying EJ&E's alternative motions, proceeded to consider the BLF&E's motion for preliminary injunction. At the hearing on this motion, it was established that the so-called National Diesel Agreement and other collective bargaining agreements which required the EJ&E to assign firemen to all locomotives operated by it were modified by the Award of Arbitration Board 282, which Award was issued pursuant to Public Law 88-108. This Award took effect on March 30, 1964 and by its terms was "to continue in force for two years from the date it takes effect, unless the parties agree otherwise." This provision of the Award was sanctioned by Section 4 of Public Law 88-108.

Acting pursuant to the Award, EJ&E then designated all of the locomotive assignments which it operated as assignments which in its opinion could be safely operated without firemen. The BLF&E, pursuant to the Award, designated 10% of these assignments as "vetoed" assignments on which firemen must be assigned. EJ&E and other railroads operating in Indiana then sought to have that state's "full crew" law declared invalid in the Indiana state courts. After the state trial court issued an injunction against enforcement of the "full crew" law, the parties to that litigation, including the EJ&E and BLF&E, entered into a "stipulation" that provided that the EJ&E would continue to provide employment to all firemen then employed by EJ&E. (Def. App. p. 19)* This "stipula-

* Respondent's Appendix in the court below.

tion" remained in effect until the Indiana Supreme Court's order reversing the trial court injunction became effective on or about June 1, 1967. (Def. App. p. 40) Thus, some two months elapsed after the Award of Arbitration Board 282 expired on March 30, 1966 until the injunction against enforcement of the state "full crew" law was vacated. See, *Public Service Commission* v. *New York Central R. Co.*, 216 N.E.2d 716.

During the two year period of the Award, EJ&E eliminated firemen from a large number of the locomotives operated by it in the State of Indiana. It continued to operate these locomotives without firemen following the expiration of the Award until about June 1, 1966 when it put firemen back on many of the locomotives because of the Indiana Supreme Court's decision. (Def. App. 40) However, it did not put firemen back on certain locomotives working within the United States Steel Corporation's plant at Gary, Indiana.

Later, in August, 1967, following the completion by United States Steel Corporation of a new 84 inch hot strip mill, EJ&E began to perform plant switching services to that facility. The locomotive assigned to that service operated around the clock and no firemen were assigned thereto. While the BLF&E representatives protested the operation of this locomotive without firemen being assigned, BLF&E did not "repeatedly request negotiations" as the District Court stated in its Memorandum (A. p. A15). Rather, all of the evidence established that the BLF&E repeatedly refused any offers of negotiations on the ground that there was nothing to discuss. (Def. App. pp. 26, 38-9).

Finally, it was established at the hearing that BLF&E had not presented any grievances to EJ&E on behalf of

the BLF&E or individual firemen and no proceeding was pending before any administrative body respecting any alleged violation of collective bargaining agreements. (Def. App. p. 71; A. p. A22).

The District Court dismissed the cause for lack of jurisdiction on the ground that the dispute between the parties was a "minor" dispute rather than a "major" dispute under the Railway Labor Act and the authority of this Court's decision in *Elgin, Joliet and Eastern Railway Co.* v. *Burley,* 325 U.S. 711 (1945). The court also relied on *Brotherhood of Locomotive Engineers* v. *Louisville and Nashville R. Co.,* 373 U.S. 33 (1963).

On appeal, the Court of Appeals affirmed, holding that the dispute between the parties was a "minor" dispute which could be resolved by an administrative interpretation of the previously bargained for or arbitrated agreements between the parties.

ARGUMENT

I.

The real controversy between the parties to this action is a simple dispute about whether or not the collective bargaining agreements respecting rates of pay, rules and working conditions currently in effect between the EJ&E and the BLF&E require the use of firemen on a locomotive performing an industrial switching service at the 84 inch hot strip mill of United States Steel Corporation at Gary, Indiana. The EJ&E takes the position that these collective bargaining agreements do not require the use of firemen on the assignment. The BLF&E, of course, takes the contrary position that the current agreements require the use of firemen.

Both the Court of Appeals and District Court recognized this controversy to be a "minor" dispute under this Court's decision in *Elgin, Joliet and Eastern Railway Co.* v. *Burley,* 325 U.S. 711 (1945), properly referable to an administrative agency for resolution as to the meaning and proper application of the existing collective bargaining agreement. They also noted that neither the BLF&E nor the EJ&E sought to change existing agreements and form a new agreement under the provisions of the Railway Labor Act—the classic "major" dispute in the railroad industry.

The decision of the court below is consistent with the following court of appeals decisions.

1. *Brotherhood of Locomotive Firemen & Enginemen* v. *Chicago & Illinois Midland Ry. Co.,* 386 F. 2d 229 (7th Cir. 1968), where the BLF&E filed an action to require

the railroad to restore and continue to operate a yard switching engine because the collective bargaining agreements, about which the BLF&E alleged there was "no dispute," required such restoration and operation. The railroad answered that the agreement relied on by BLF&E was modified by the Award of Arbitration Board 282. The Seventh Circuit found that there was a genuine dispute between the parties as to the interpretation and application of the agreement as modified and held that exclusive jurisdiction rested in an administrative agency to resolve the dispute.

2. *Illinois Central R. Co.* v. *Brotherhood of Locomotive Firemen & Enginemen,* 332 F. 2d 850 (7th Cir. 1964), where, in a dispute over transportation facilities at terminals, the court affirmed the issuance of an injunction against the BLF&E's strike on the ground that a "minor" dispute was involved because no written notice under Section 6 of the Railway Labor Act had been served to effect a change in the existing agreements.

3. *St. Louis, San Francisco & Texas Ry. Co.* v. *Railroad Yardmasters of America,* 328 F. 2d 749 (5th Cir. 1964). In that case, the railroad abolished certain yardmaster positions, allegedly in accordance with the collective bargaining contracts. The court held the dispute to be "minor" and subject to the exclusive jurisdiction of the administrative body set up under Section 3 of the Railway Labor Act.

4. *Southern Ry. Co.* v. *Brotherhood of Locomotive Firemen & Enginemen,* 384 F. 2d 323 (D.C. Cir. 1967). The court there found that a dispute over whether the railroad was complying with the applicable collective bargaining agreements in failing to use firemen on certain locomotives was a "minor" dispute properly referable to

the adjustment board under Section 3 of the Railway Labor Act.

5. *Switchmen's Union* v. *Southern Pacific Co.*, 398 F. 2d 443 (9th Cir. 1968), where the court found that a dispute over the abolishment of a yardmaster's job was a "minor" dispute in view of the railroad's claim that its action was proper under the collective bargaining agreements and the union's claim that the action violated the agreements.

In suggesting that the decision below is contrary to the decisions in the litigation reported as *Bangor and Aroostook R. Co.* v. *Brotherhood of Locomotive Firemen & Enginemen*, 253 F. Supp. 682, remanded with directions, *sub nom. Brotherhood of Railroad Trainmen* v. *Akron & Baberton Belt R. Co.*, 385 F. 2d 581, cert. denied 389 U.S. 923, the BLF&E erroneously represents what transpired and what the courts held in that case.

The *Bangor* litigation commenced by the EJ&E and other carriers in Washington, D.C. was first of all an action for an injunction against the BLF&E to prevent an unlawful work stoppage. That injunction was obtained as part of the judgment of the district court which is set forth in Defendant's Appendix in the court below at pages 1-7. The action also constituted a review of the Award of Arbitration Board 282 in the light of Public Law 88-108. The district court judgment was, of course, the last final judgment in force and effect between the EJ&E and the BLF&E when the present action was commenced.[1]

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[1] On the basis of that final judgment, EJ&E suggested that BLF&E's claim for relief presented in its complaint was res judicata. E.g. *Huron Holding Co.* v. *Lincoln Mine Operating Co.*, 312 U.S. 183, 189 (1941); *Turner* v. *Louisville & Nashville R. Co.*, 400 F.2d 572 (5th Cir. 1968) affirming 67 LRRM 2617.

What the Court of Appeals held in *Bangor* was that the "work rules" actually in effect on the last day of Award were the "work rules" which survived and which could be modified only by following the procedures of Section 6 of the Railway Labor Act. The Court ruled that where there was no dispute as to the size of an engine crew during the period of the Award—because a state full crew law "blocked" a railroad from reducing the size of the engine crew—the work rules actually in effect on the last day of the Award were contained in the National Diesel Agreement. But, this situation is not the instant case because in Indiana the EJ&E was not "blocked" from changing the size of engine crews on plant switching assignments[2] or on common carrier assignments.

In fact, there was a real dispute between the EJ&E and the BLF&E over the size of engine crews in that state during the period of the Award and the EJ&E eliminated firemen from locomotive assignments during that time in accordance with the Award and the "stipulation" which was in effect with the BLF&E. Because of the injunction against enforcement of the Indiana full crew law which prevailed during the period of the Award, the dispute between EJ&E and BLF&E as to the size of engine crews was broader and more encompassing than a dispute about the size of engine crews on plant switching locomotives. If the Indiana "full crew" act had been in effect during

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[2] The State of Indiana has never sought to apply the Indiana full crew law to EJ&E's plant switching locomotives since the law was enacted in 1937. A similar law was held inapplicable in Ohio, *Cooperative Legislative Com.* v. *Public Utilities Commission,* 80 N.E.2d 159.

the period of the Award, it is safe to assume that the only dispute between the EJ&E and the BLF&E would have been over the use of firemen on industrial switching locomotives. However, because the broader dispute existed and because EJ&E changed the size of engine crews and thus established a new "work rule" modifying the old National Diesel Agreement, the decision in *Bangor* is not inconsistent with the decision below.

This view of the Court of Appeals decision in *Bangor* finds support in a recent (February 28, 1969) decision in that same litigation, *Brotherhood of Locomotive Firemen and Enginemen* v. *Bangor and Aroostook R. Co.*, ... F. 2d ..... (No. 20,909, D.C. Cir. 1969), which is reprinted in the appendix hereto. This recent decision in *Bangor,* as well as the one reported at 385 F. 2d 581, are also consistent with the decision below in that both decisions contemplated and recognized the continuing use and need for administrative agencies charged with the function of interpretation of collective bargaining agreements in the event of disputes between the parties to them. The *Bangor* opinion reported at 385 F. 2d 581, specifically states at page 604 that it is proper for petitioner to bring forward for resolution by Arbitration Board 282 "questions of interpretation as to the scope and applicability of the Award". And the Court later stated in an unreported memorandum and order dated September 21, 1967:

> "This court has determined that Board 282 has continuing vitality for deciding questions of interpretation as to the scope and application of the Award. (Opinion of May 12, 1967, pp. 39-40). [385 F. 2d at 604]
>
> "It has also made clear that even on a question where the Board did not have final authority, i.e. interpretation of the underlying statute, the court would accept

> the interpretation of the Board, would itself have rendered, so long as the Board's interpretation was not unreasonable or contrary to ascertainable legislative intent. (Supplemental opinion of July 31, 1967, p. 15). [385 F. 2d at 612-3]" (Def. App. p. 13).

The same Court made the same determination in *Brotherhood of Railroad Trainmen* v. *Terminal Railway Association of St. Louis*, 380 F. 2d 584 (D.C. Cir. 1967).

The BLF&E does not suggest any grounds for its assertion that the decision below conflicts with *Locomotive Engineers* v. *Chicago, Rock Island & Pacific R. Co.*, 382 U.S. 423 (1966). That case held only that Public Law 88-108 and the Award did not pre-empt state laws relating to the manning of trains. It clearly does not stand for any proposition that Public Law 88-108 and the Award were not effective and could not operate with respect to locomotives and trains to which a "full crew" law was inapplicable.

II.

BLF&E suggests that this court should review the decision below as a vehicle for examining the validity of long established distinctions between "major" and "minor" disputes under the Railway Labor Act. This argument, we submit, is clearly addressed to the wrong forum for it was Congress which made the distinction between these types of railway labor disputes and not the courts. These statutory distinctions were explained in detail in this Court's landmark decision in *Elgin, Joliet and Eastern Railway Co.* v. *Burley*, 325 U.S. 711 (1945), but the distinction between them is set forth in Sections 2, 3 and 6 of the Railway Labor Act.

CONCLUSION

For the forgoing reasons, we respectfully suggest that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,909
BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,
Appellant

v.

BANGOR AND AROOSTOOK RAILROAD, et al.,
Appellees

No. 20,910
BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,
Appellant

v.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, et al.,
Appellees

Appeals from the United States District Court
for the District of Columbia

Decided February 28, 1969

Mr. Joseph L. Rauh, Jr., with whom *Messrs. John Silard Isaac N. Groner* and *Alex Elson*, were on the brief, for appellant.

Mr. Francis M. Shea, with whom *Mr. Richard T. Conway* was on the brief, for appellees.

Before DANAHER,* BURGER and LEVENTHAL, *Circuit Judges.*

PER CURIAM: This case presents a particular facet of the issues relating to the manning of diesel locomotive crews with firemen. The background and general legal significance of Public Law 88-108 and of the expiration of Award of Arbitration Board 282 (Award) are set forth in our *Akron* opinion.[1] *Akron* involved appeals from the District Court's judgment of May 12, 1966, as to the firemen manning and crew consist rules in effect after the expiration of the Award. The instant appeals in the same consolidated cases relate to carrier actions that occurred after expiration of awards which were not before us in *Akron.*

Appellee Galveston Wharves (carrier) operates a single terminal or yard, located within one seniority district, which had five regularly assigned yard crews as of January 3, 1967. On that day this carrier posted a bulletin listing four firemen jobs which it proposed to abolish the next day. All of its crews had been listed during the period of the Award as crews on which, in the carrier's judgment, firemen were not needed, and one of them had been designated, in effect vetoed, by appellant Union, the BLFE. Ordinarily, under the principles set forth in *Akron,* this would plainly have established work rules, continuing in effect after expiration of the Award, as providing for a fireman only on the one vetoed crew, and the fact that firemen were actually retained in the positions on these crews until January 3, 1967, would be no bar to their subsequent separation.

The question arises because there were no "deadman controls" on the equipment as of the date of the expiration of the Award, and paragraph B(5) of the Award, which provided that the carrier was not required to use firemen

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* Circuit Judge Danaher became Senior Circuit Judge on January 23, 1969.

[1] Brotherhood of Railroad Trainmen v. Akron & Barberton Belt R.R. Co., 128 U.S.App.D.C. 59, 385 F.2d 581 (1967), *cert. denied,* 390 U.S. 923 (1968).

on listed crews (that were not counter-designated by the Union), contained a proviso—"provided that no yard locomotive shall be operated without a fireman (helper) unless and until it is equipped with a deadman control in good operating condition." The February 28, 1962, REPORT OF THE PRESIDENTIAL RAILROAD COMMISSION, which found that only in rare situations was the use of a fireman necessary for safe operation of locomotives in freight or yard service, had recommended that no yard locomotive should be operated without a fireman unless and until equipped with a deadman control in good operating condition. The Opinion of the Neutral Members of Arbitration Board 282 refers to "installing a dead-man control in all yard engines which our award requires as a condition precedent to the operation of such locomotives without a fireman." *Railroads* v. *Operating Brotherhoods,* 41 Lab. Arb. 673, 687-99 (1963).

The carrier apparently ordered the deadman controls early in 1965, but because of delays in delivery and imperfections of equipment, the controls were not finally installed until December 1966, approximately nine months after expiration of the Award.

Although the District Court at first ruled favorably on the Union's application for an injunction to forestall the carrier from placing into effect its bulletin of January 3, 1967—in the light of its "affirmative acts" approach referred to in our *Akron* opinion—on reconsideration the District Court denied the relief sought, on the ground that the Union's position was contrary to a ruling of the Board 282 interpreting its Award. We find it unnecessary to refer to that ruling as such, as to the District Court's reasoning, because we think the principles set forth in our *Akron* opinion require affirmance of the judgment.

The Union also relies on our *Akron* opinion, and specifically on our ruling concerning the situation in states where full crew laws governed during the life of the Award. As to that we held that even though the elimina-

tion of the fireman positions listed by the carrier was blocked only because of the existence of that law, the subsequent repeal of the state law following expiration of the Award came too late for the carrier to terminate firemen involved, notwithstanding that during the lifetime of the Award the carrier had taken all the action available to it by listing the position for blanking.[2]

That ruling does not, however, apply to the issue before us. It was based on the principle that the existence of the state law meant that there was no present dispute then pending between the parties as to the size use of firemen, that the only dispute pending before Congress, and the only dispute as to which authority was delegated to the Board, was one that did not extend to crews in States which had full crew laws." *See BLFE* v. *Chicago, Rock I. & Pac. R.R.*, 382 U.S. 423, 433 (1966).[3] In short the existence of the state law limited the jurisdiction and authority of the Board.

The issue before us is not one where the Board's authority was thus limited. The decision whether to permit termination of the firemen positions was part of the dispute before the Board; the only question was whether, and under what conditions. Although the Award uses the punctuation of a proviso its meaning was simply this, that the work rule permissible under the Award was one providing that firemen would not be used when deadman controls were in working condition. Suppose deadman controls were in effect during the Award's lifetime and later became inoperative, either during the life of the Award or later. It would not be argued that the work rule discontinuing the fireman position was in effect on certain days (when the deadman controls were working) but not on

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[2] *See Akron, supra* n. 1, 128 U.S.App.D.C. at 89, 385 F.2d at 611-12.

[3] *See* 382 U.S. at 433: "Congress wanted to do as little as possible in solving the dispute which was before it, and we note this dispute was not over the size of crews in States which had full crew laws."

other days (when the controls were not working). We think the sounder construction is that the same work rule is in effect at all times, but the practical consequence of the work rule will vary in accordance with physical conditions, depending on the condition of the deadman control.

In our view the work rule in effect on the last day of the Award provided that the crews involved here were crews on which firemen were not required whenever the deadman controls were working; that work rule is still in effect; and it does not require a fireman on that crew even though the carrier had not removed the fireman by the end of the effective period of the Award.

The Union develops what it presents as unwelcome consequences of this view. The District Court also appears to have been concerned with the harsh consequences of the carrier's approach. We do not explore this matter, nor consider whether the scope of our ruling leaves open to the Union some minor dispute that could be pressed in an administrative forum. We have rather concerned ourselves with what we consider to be the fundamental legal question raised by the appeal. We conclude that the judgment should be

Affirmed.